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No. 91-1286

In the Supreme Court of the United States

OCTOBER TERM, 1991

SANGRE DE CRISTO DEVELOPMENT COMPANY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner had a compensable property interest in a lease approved by the Secretary of the Interior pursuant to 25 U.S.C. 415 before the Secretary had complied with provisions of the National Environmental Policy Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Davis v. *Morton*, 335 F. Supp. 1258 (D.N.M. 1971), rev'd, 469 F.2d 593 (10th Cir. 1972) 2, 3, 5, 6, 7, 8, 9

Federal Crop Insurance Corp. v. *Merrill*, 332 U.S. 380 (1947) 4, 5

Gray v. *Johnson*, 395 F.2d 533 (10th Cir.), cert. denied, 392 U.S. 906 (1968) 4, 6

Kleppe v. *Sierra Club*, 427 U.S. 390 (1976) 7

Lawrence v. *United States*, 381 F.2d 989 (9th Cir. 1967) .. 5

Office of Personnel Management v. *Richmond*, 110 S. Ct. 2465 (1990) 6

Quantum Exploration, Inc. v. *Clark*, 780 F.2d 1457 (9th Cir. 1986) 5

Robertson v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989) 7

Strycker's Bay Neighborhood Council, Inc. v. *Karlen*, 444 U.S. 223 (1980) 7

Tewa Tesuque v. *Morton*, 498 F.2d 240 (10th Cir. 1974), cert. denied, 420 U.S. 962 (1975) 8-9

Utah Power & Light Co. v. *United States*, 243 U.S. 389 (1917) 5-6

Wisconsin Winnebago Buisness Comm. v. *Koberstein*, 762 F.2d 613 (7th Cir. 1985) 5

Yavapai-Prescott Indian Tribe v. *Watt*, 707 F.2d 1072 (9th Cir.), cert. denied, 464 U.S. 1017 (1983) 5

Constitution and statutes: Page

U.S. Const. Amend. V	4
Act of June 2, 1970, Pub. L. No. 91-275, § 2, 84 Stat. 303	5
Act of Dec. 18, 1980, Pub. L. No. 96-549, § 3, 94 Stat. 3220	3
Administrative Procedure Act, 5 U.S.C. 702	3
National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*	2
42 U.S.C. 4332(2)(C)	2
25 U.S.C. 81	5
25 U.S.C. 415(a)	2, 4, 5
25 U.S.C. 210	5

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 932 F.2d 891. The opinion of the district court (Pet. App. 14a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1991. A petition for rehearing was denied on September 24, 1991. Pet. App. 34a. On December 11, 1991, Justice White extended the time for filing a petition for a writ of certiorari to and including January 22, 1992 (Pet. App. 36a), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. A group of investors formed petitioner Sangre de Cristo Development Company, Inc. (Sangre), in 1968. Sangre intended to conclude a 99-year lease with the Tesuque Pueblo, a federally recognized Indian tribe, for land that the United States held in trust for the Pueblo. Under 25 U.S.C. 415(a), any such lease must be submitted to the Secretary of the Interior for approval. After several years of negotiations, Sangre and the Pueblo entered into a lease on April 17, 1970. Pet. App. 16a. The Area Supervisor of the Bureau of Indian Affairs approved the lease on May 2, 1970. *Ibid.* No effort was made to comply with the provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.*, because the Department of the Interior took the position at that time that approvals of leases for Indian lands were not "major Federal actions" and thus were not subject to NEPA. See 42 U.S.C. 4332(2)(C).

Neighboring landowners and environmental groups sued the Secretary of the Interior and other officials to enjoin the issuance or approval of the lease, on the ground that the approval of the lease was a major federal action subject to the provisions of NEPA. The district court denied relief, but the court of appeals reversed. *Davis* v. *Morton*, 335 F. Supp. 1258 (D.N.M. 1971), rev'd, 469 F.2d 593 (10th Cir. 1972). The Tenth Circuit held that decisions to approve leases of Indian land constitute major federal actions subject to NEPA. 469 F.2d at 597. The plaintiffs in *Davis* v. *Morton* had "requested the court to issue a preliminary and permanent injunction enjoining [the federal parties] from approving, allowing or acting in any way on submissions or approvals required or permitted under the lease agreement until the environmental impact of the project had been studied and evaluated."

Id. at 595. Upon reversing the district court, the Tenth Circuit remanded "the case * * * to the trial court with directions to grant the relief prayed for." *Id.* at 598. The district court entered an injunction accordingly.

2. The Bureau of Indian Affairs (BIA) then began work on an environmental impact statement (EIS). As the draft EIS was circulating in the Interior Department, the ownership of Sangre changed. A new group of investors purchased the company in November 1973, aware of the fact that all development under the lease had been enjoined pending completion of the EIS. Pet. App. 18a. The draft and final EIS went through revision and approval, and the document eventually was issued on July 12, 1977. It identified several adverse consequences that would result from proceeding with the development as planned. The administration of the Pueblo had meanwhile changed, and the Pueblo formally requested the Secretary to withhold approval of the lease. *Id.* at 20a. On August 25, 1977, the Secretary announced, through his designee, that he would disapprove the lease, based on the environmental impact of the lease and the opposition of the Pueblo. Sangre did not challenge the Secretary's action as arbitrary or capricious under the Administrative Procedure Act, 5 U.S.C. 702.[1]

3. Petitioners did, however, sue the United States in the district court under a special jurisdictional statute, Act of Dec. 18, 1980, Pub. L. No. 96-549, § 3, 94 Stat. 3220 (reproduced at Pet. App. 44a-46a). In their complaint, petitioners alleged, *inter alia*, that the government took Sangre's property without just compensation when the Secretary declined to approve

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[1] Sangre was forced into involuntary bankruptcy on October 26, 1977. Pet. App. 4a. This action is being pursued by the trustee in bankruptcy.

the lease after the EIS was assembled and approved. The district court rejected petitioners' claim. It held that the Secretary's initial approval of the lease was invalid because the Secretary had not complied with NEPA before issuing it, and that therefore "the lease itself was either void or voidable." Pet. App. 32a. Either way, the court reasoned, Sangre had no vested rights in the lease, and the government was not liable to Sangre for the taking of any property under the Fifth Amendment. Pet. App. 32a.

4. The Tenth Circuit affirmed the district court's decision. The court of appeals agreed that the approval of the lease without complying with NEPA rendered the initial approval invalid. Pet. App. 6a. It explained that leases subject to 25 U.S.C. 415(a) require *valid* approval by the Secretary, and that the Secretary's failure to comply with NEPA rendered his purported approval invalid. Pet. App. 6a. Relying on *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380 (1947), and *Gray* v. *Johnson*, 395 F.2d 533 (10th Cir.), cert. denied, 392 U.S. 906 (1968), the court of appeals held that those who deal with the government assume the risk that the agents of the government might act improperly. Pet. App. 6a-7a. "The Department's August 25, 1977 action, regardless of whether it is referred to as a recision or merely a failure to approve, did not divest Sangre of a leasehold interest because Sangre's interest never vested in the first place." *Id.* at 7a.

ARGUMENT

A party claiming that its property was taken must initially show that it had a property interest protected by the Fifth Amendment. Petitioners do not dispute that, under 25 U.S.C. 415(a), they could not obtain a property interest in the lease unless and

until it received secretarial approval.[2] Petitioners claim, however, that the Secretary's action in purporting to approve the lease in 1970, even without having complied with NEPA, constituted the approval necessary to vest petitioners with a property interest in the lease.

Petitioners' argument is mistaken. The Secretary was required to comply with NEPA in 1970 when he purported to approve the lease. That was the precise holding of the Tenth Circuit in *Davis* v. *Morton*, and petitioners do not now argue that that holding was incorrect.[3] It is well settled that a party cannot obtain a vested property interest by relying on the actions of a government agent acting contrary to law or regulation. See, *e.g.*, *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947) ("anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority"); *Utah Power & Light Co.* v.

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[2] See, *e.g.*, *Quantum Exploration, Inc.* v. *Clark*, 780 F.2d 1457, 1459-1460 (9th Cir. 1986) (tribe can rescind agreement prior to secretarial approval under 25 U.S.C. 2102); *Wisconsin Winnebago Business Comm.* v. *Koberstein*, 762 F.2d 613, 619 (7th Cir. 1985) (contract without secretarial approval under 25 U.S.C. 81 null and void); *Lawrence* v. *United States*, 381 F.2d 989, 990 (9th Cir. 1967) (contract without secretarial approval void); cf. *Yavapai-Prescott Indian Tribe* v. *Watt*, 707 F.2d 1072, 1074-1075 (9th Cir.) (Secretary must approve termination of lease), cert. denied, 464 U.S. 1017 (1983).

[3] Any doubt about the need for preparation of an EIS in cases like the present was obviated by a 1970 amendment to 25 U.S.C. 415(a), which provided that the Secretary, prior to approving any lease for Indian lands, must "first satisfy himself that adequate consideration has been given to * * * the effect on the environment of the uses to which the leased lands will be subject." 25 U.S.C. 415(a). See Act of June 2, 1970, Pub. L. No. 91-275, § 2, 84 Stat. 303.

United States, 243 U.S. 389, 409 (1917) ("the United States is neither bound nor estopped by the acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit"); *Gray* v. *Johnson*, 395 F.2d 533, 537 (10th Cir.), cert. denied, 392 U.S. 906 (1968). Although this Court has on occasion questioned whether the government might be bound in some cases of affirmative misconduct, see *Office of Personnel Management* v. *Richmond*, 110 S. Ct. 2465, 2470 (1990) (citing cases), no such misconduct on the part of the Secretary at the time he purported to approve the lease has been alleged in this case. Rather, as the court of appeals explained, the court in *Davis* "agreed * * * that the Department was 'without authority to grant the lease since no environmental impact study was conducted prior to approval of the lease as required by NEPA.'" Pet. App. 7a (quoting *Davis*, 469 F.2d at 594). Accordingly, this case is squarely governed by long-established principles under which the Secretary's 1970 action in purporting to approve the lease, in violation of NEPA, failed to vest petitioners with a property right in that lease.

Petitioners argue that, although some actions taken by a government official contrary to law or regulation are invalid, the Secretary's action in this case—his purported approval of the lease in 1970—should not be held to fall within that category. See Pet. 18-19. According to petitioners, the Secretary's failure to comply with NEPA merely resulted in the imposition of a requirement that he prepare a post-approval EIS and then ratify his prior approval of the lease, regardless of the environmental effects of the project that are identified in the EIS.

The regime envisioned by petitioners would be a strange one, in which an agency is required to pre-

pare an EIS, but is forbidden from acting on the information disclosed by the EIS. The primary function of NEPA is to "ensure[] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); see also *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227 (1980) (per curiam) (court must "insure that the agency has considered the environmental consequences"); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (NEPA requires agencies to take a " 'hard look' at environmental consequences").[4] Petitioners' suggestion—that the Secretary was required to prepare an EIS and then simply shelve it because the decision to approve the lease had already been made—would render NEPA's requirements entirely futile.

Petitioners further argue that a violation of NEPA does "not automatically result in injunctive relief." Pet. 15.[5] That fact, however, is irrelevant here, for the

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[4] Petitioners believe it significant that NEPA does not "dictate or control agency decisions." Pet. 15. That fact, however, does not support any of petitioners' arguments. Although NEPA does not determine substantive agency decisions, NEPA does require that decisionmakers consider environmental consequences identified in an EIS before taking major federal actions.

[5] Petitioners also argue that NEPA "need not be complied with when agency action is mandatory rather than discretionary." Pet. 15. But the Secretary's 1970 approval of the lease was plainly discretionary—a fact that petitioners do not dispute. In any event, the Tenth Circuit's decision in *Davis* v. *Morton* establishes that, whatever may be the case with respect to the need to comply with NEPA in other cases, the Secretary was required to do so before approving the lease involved here.

question in this case does not concern whether an injunction is warranted to remedy a particular NEPA violation. The NEPA violation involved here occurred in 1970. The question whether an injunction should have been entered to remedy that violation was resolved in 1972 by *Davis* v. *Morton*, which held that the injunctive relief sought by the plaintiffs in that case was warranted.[6] The issue here is whether the Secretary's purported approval of the lease in 1970, in violation of NEPA, was valid. The Tenth Circuit's decision in *Davis* v. *Morton*, as reaffirmed in this case, that it was not valid does not conflict with the decision of any other court and does not warrant further review.

Finally, petitioners argue (Pet. 20-22) that the Tenth Circuit misread its own decision in *Davis* v. *Morton* when it concluded that *Davis* had "held that the initial approval of the lease by the Department was invalid because it was not preceded by the requisite environmental study." Pet. App. 6a. Further review would not be warranted to determine whether the Tenth Circuit accurately read its own prior opinions. And, in any event, the Tenth Circuit's reading of *Davis* was correct.[7] The only possible purpose of

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[6] The plaintiffs in *Davis* sought to "enjoin[] [the Secretary] from approving or acting on any submissions or approvals under the lease." 469 F.2d at 598. The court of appeals remanded the case to the trial court "with directions to grant the relief prayed for." *Ibid.*

[7] Petitioners contend (Pet. 16-17) that the Tenth Circuit, in a case decided after *Davis* but before the Secretary determined in 1977 not to approve the lease, held that the lease was not void. See *Tewa Tesuque* v. *Morton*, 498 F.2d 240 (1974), cert. denied, 420 U.S. 962 (1975). *Tewa Tesuque* involved an attempt by a faction of the Tesuque Pueblo to overturn the Secretary's approval of the lease. The court's statement that *Davis* "did not * * * result in cancellation of the lease," 498 F.2d at 243,

requiring preparation of an EIS in *Davis* was to prompt a reconsideration of the Secretary's approval in light of the information disclosed in the EIS. To be sure, nothing in NEPA required the Secretary to revoke his prior approval after considering the EIS. But, as explained above, the result reached in *Davis* is inexplicable if it required that an EIS be prepared and then entirely disregarded.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1992

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was made in the context of a ruling that, after *Davis*, the Pueblo may have retained an interest in the lease sufficient to make it an indispensable party to the case. Far from holding that the Secretary's failure to prepare an EIS had no effect on the lease's validity, the Tenth Circuit in *Tewa Tesuque* simply recognized that the ultimate validity of the lease remained an open question until the Secretary, after preparing and reviewing an EIS, determined whether to approve the lease. That question was answered when, in 1977, the Secretary decided not to approve it. Cf. Pet. App. 32a (after *Davis*, "the lease itself was either void or voidable").